

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBIN FARRIS; RECALL DALE WASHAM, a Washington political committee; and OLDFIELD & HELSDON, PLLC, a Washington professional limited liability company,

Plaintiffs,

DAVE SEABROOK, Chair; BARRY SEHLIN, Vice Chair; DOUGLAS ELLIS, Interim Executive Director; JENNIFER JOLY; and JIM CLEMENTS, in their official capacities as officers and members of the Washington State Public Disclosure Commission.

Defendant.

CASE NO. 3:11-cv-5431 RJB

ORDER ON PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment. Dkt.

61. The Court has considered the pleadings filed in support of and in opposition to the Motion and the file herein.

FACTS

2 This case arises from Plaintiffs' attempts to recall an elected official in Pierce County,
3 Washington, and implicates Washington's campaign finance laws. Dkt. 1. Plaintiffs challenge
4 the constitutionality of two Washington statutes which limit campaign contributions, RCW §§
5 42.17A.405(3) and 42.17A.420(1) (the statutes were codified as 42.17.640(3) and 42.17.105(8),
6 respectively, when Plaintiffs filed the Complaint). *Id.*

7 | A. LEGAL PROCEEDINGS TO RECALL DALE WASHAM

8 In 2010, Plaintiff Robin Farris became concerned about the conduct of an elected official,
9 Dale Washam, in Pierce County, Washington. Dkt. 13-1, at 2. Mr. Washam was elected as the
10 Pierce County, Washington Assessor-Treasurer in November of 2008. *Id.* Prompted by her
11 concern about Mr. Washam’s behavior, Ms. Farris decided to try to recall him. *Id.* She created a
12 political committee called Recall Dale Washam (“RDW”) and registered RDW as a “mini
13 reporting” committee with Washington’s Public Disclosure Commission. *Id.* Mini reporting
14 committees are subject to fewer reporting requirements if the committee’s contributions and
15 expenditures remain below a certain threshold. *Id.*

16 On October 29, 2010, Ms. Farris, acting *pro se*, filed six written charges against Mr.
17 Washam with the Pierce County Auditor seeking to place on the ballot the question of whether
18 Mr. Washam should be recalled. Dkt. 13-1, at 2. The auditor arranged for Mr. Washam to be
19 served with the recall charges and referred the matter to the Pierce County, Washington
20 Prosecutor's Office. *In Re Recall of Washam*, 171 Wash.2d 503 (2011). A Special Deputy
21 Prosecuting Attorney formulated a ballot synopsis, arranged for Washam to be served with
22 charges, and on November 12, 2010, petitioned the Pierce County Superior Court to review the
23 adequacy of the charges. *Id.*

1 In November of 2010, Ms. Farris set up a Recall Dale Washam campaign website
 2 (recalldalewasham.org), and a Recall Dale Washam Facebook page that was originally attached
 3 to her personal Facebook page. Dkt. 73, at 37. Ms. Farris closed to the public the Facebook
 4 page attached to her personal page after a copy of a posting surfaced during the litigation before
 5 this Court. *Id.* Ms. Farris then set up a separate Recall Dale Washam Facebook page that could
 6 be seen by the public. *Id.* at 39.

7 Plaintiff Oldfield & Helsdon, PLLC, is a law firm whose principals, Tom Oldfield and
 8 Jeff Helsdon, practice law in Pierce County, Washington. Dkts. 13-2; 13-3. They state that they
 9 also became aware of numerous allegations regarding Mr. Washam's conduct in office after
 10 reading about them in the *Tacoma News Tribune* in 2009 and 2010. Dkts. 13-2, at 1; 13-3, at 1.
 11 They state that they also came to believe that for the good of Pierce County, Mr. Washam should
 12 be recalled. Dkts. 13-2, at 2; 13-3, at 3.

13 After reading in the newspaper about the start of recall proceedings in the superior court,
 14 on November 16, 2010, Mr. Oldfield and Mr. Helsdon contacted Ms. Farris to offer pro bono
 15 legal services for the superior court's sufficiency hearing and the recall effort in general. Dkt.
 16 13-1, at 2. She accepted their offer. *Id.* On November 17, 2010, Ms. Farris, "by then assisted by
 17 pro bono counsel, filed an amended request that contained a proper verification under RCW
 18 29A.56.110 and corrected a few typographical errors." *In Re Recall of Washam*, 171 Wash.2d
 19 503 (2011).

20 The superior court held a hearing on the factual and legal sufficiency of the charges on
 21 December 16, 2010. *In Re Recall of Washam*, 171 Wash.2d 503 (2011). The superior court
 22 found five of the six charges sufficient. *Id.* The superior court corrected the ballot synopsis by
 23 striking one of the charges and by inserting dates. *Id.* The ballot synopsis now reads:
 24

1 The charge that Dale Washam, as Pierce County Assessor–Treasurer, committed
 2 misfeasance in office, malfeasance in office and/or violated his oath of office
 3 alleges that he violated state and local law by (1) retaliating against an employee
 4 for filing a complaint against him between January 22, 2009 and March 16, 2010,
 5 (2) grossly wasting public funds in pursuing criminal charges against his
 6 predecessor as Assessor–Treasurer from January 2, 2009 until October 29, 2010,
 7 (3) failing to protect the employee from retaliation, false accusations or future
 8 improper treatment between January 22, 2009 and March 16, 2010, and by failing
 9 thereafter to rectify his retaliatory actions against his employee, (4) refusing to
 10 participate in investigations of whether he had discriminated and retaliated against
 11 his employees between January 22, 2009 and March 16, 2010, and (5) discharging
 12 his duties in an unlawful and biased manner from January 2, 2009 until October
 13 29, 2010.

14 Should Dale Washam be recalled from office based on this charge?

15 *In Re Recall of Washam*, 171 Wash.2d 503 (2011). Ms. Farris and RDW were represented by
 16 Mr. Oldfield and Mr. Helsdon at the hearing. Dkt. 13-2, at 3.

17 On March 3, 2011, the Washington Supreme Court affirmed the superior court’s
 18 sufficiency determination and the superior court’s corrections to the ballot synopsis. *In Re*
 19 *Recall of Washam*, 171 Wash.2d 503 (2011). A written opinion followed on May 12, 2011. *Id.*
 20 Ms. Farris and RDW were again represented by Mr. Oldfield and Mr. Helsdon during the
 21 Supreme Court proceedings. Dkt. 13-2, at 3. Ms. Farris states that she would not have been able
 22 to afford to hire legal assistance for the recall campaign at that point. Dkt. 13-1, at 4.

23 **B. WASHINGTON’S CONTRIBUTION LIMITS ON RECALL CAMPAIGNS AND THE**
PUBLIC DISCLOSURE COMMISSION

24 RCW § 42.17A.405(3), states that

25 No person, other than a bona fide political party or a caucus political committee,
 26 may make contributions to a state official, a county official, a city official, a
 27 school board member, or a public official in a special purpose district against
 28 whom recall charges have been filed, or to a political committee having the
 29 expectation of making expenditures in support of the recall of the state official,
 30 county official, city official, school board member, or public official in a special
 31 purpose district during a recall campaign that in the aggregate exceed eight
 32 hundred dollars if for a legislative office, county office, school board office . . .

1 As implemented by WAC 390-05-400, RCW § 42.17A.405(3) now prohibits
2 contributions over nine hundred dollars.

3 RCW § 42.17A.420(1) states that

4 It is a violation of this chapter for any person to make, or for any candidate or
5 political committee to accept from any one person, contributions reportable under
6 RCW 42.17A.240 in the aggregate exceeding fifty thousand dollars for any
7 campaign for statewide office or exceeding five thousand dollars for any other
8 campaign subject to the provisions of this chapter within twenty-one days of a
9 general election

10 Under then-RCW § 42.17.020(15)(c), campaign contributions other than money “are
11 deemed to have monetary value.” Services furnished at less than their fair market value for the
12 purpose of assisting a political committee are deemed a contribution. *Id.* “Such a contribution
13 must be reported as an in-kind contribution at its fair market value and counts towards any
14 applicable contribution limit of the provider.” *Id.*

15 After contacting Plaintiffs informally, on February 9, 2011, Washington’s Public
16 Disclosure Commission (“PDC”) issued a “Notice of Administrative Charges” to RDW. Dkt.
17 13-1, at 12. The PDC alleged that RDW exceeded the limitations for mini campaign reporting
18 before requesting a change in reporting options. *Id.* The PDC also alleged that RDW “violated
19 RCW 42.17.640 (now 42.17A.405(3)) by exceeding the \$800 per-election limit on contributions
20 from any one source (other than a bona fide political party or a caucus political committee) to a
21 political committee supporting the recall of an elective county officeholder.” *Id.* The PDC
22 stated that it considered that “early contributions to and expenditures by a recall committee,
23 including legal expenses, are subject to reporting.” *Id.* at 13. The PDC asserted that as of
24 December 31, 2010, RDW had exceeded the “\$500 limit of the mini reporting option on
contributions from one source by \$21,116.25 and exceeded the \$5,000 limit of mini reporting on

1 total contributions by \$19,556.25. Oldfield & Helsdon, PLLC's in kind contributions exceeded
 2 the \$800 per-election limit in RCW 42.17.640 by \$20,816.25." *Id.* at 15.

3 After receiving correspondence from Plaintiffs, the PDC, by letter, withdrew the
 4 February 9, 2011 Notice of Administrative Charges against RDW. Dkt. 13-1, at 35-36. The
 5 PDC stated that it intended to reissue charges alleging violations of the reporting requirements.
 6 *Id.* at 35. It further stated that

7 PDC staff does not intend to allege that Recall Dale Washam violated RCW
 8 42.17.640 by exceeding the \$800 per-election limit on contributions from any one
 9 source (other than a bona fide political party or a caucus political committee) to a
 10 political committee supporting the recall of an elective county officeholder. The
 11 fact that the PDC staff does not intend to allege a violation of RCW 42.17.640
 12 should not be construed to mean that the contribution limits of RCW 42.17.640
 13 are not applicable to the recall election. The statute, as written, is to be followed
 14 during the recall campaign.

15 *Id.*

16 After the PDC issued amended charges regarding the mini committee reporting
 17 violations, on April 25, 2011, the PDC and RDW entered into a stipulation. Dkt. 13-2, at 34-40.
 18 As part of that stipulation, the PDC recognized that "pro bono legal services rendered by
 19 Oldfield & Helsdon, PLLC to RDW after the December 16, 2010, hearing with regard to
 20 assisting RDW with the Supreme Court appeal by Dale Washam do not constitute a contribution
 21 as defined in RCW § 42.17.020(15)(c)." *Id.* at 39. In addition to the payment of a civil penalty
 22 of \$500, RDW agreed to not commit "further violations of RCW 42.17 through the election
 23 campaign for which RDW was formed." *Id.* The stipulation concluded the charges issued
 24 against RDW. *Id.* The stipulation provided that "[b]y virtue of the Commission's issuance of an
 order approving this stipulation, Recall Dale Washam surrenders all rights to appeal, or
 otherwise seek judicial review of, such order." *Id.*

1 The Stipulation, however, did not address the constitutionality of the two statutes at issue.

2 **C. RECALL PETITION RESULTS**

3 If Washington's courts find the charges sufficient, sponsors of a recall petition can then
 4 begin to collect signatures of legal voters who support the petition. RCW § 29A.56.180. In the
 5 case of a county official whose county's population exceeds forty thousand, signatures "equal to
 6 twenty-five percent of the total number of votes cast for all candidates for the office to which the
 7 officer whose recall is demanded was elected at the preceding election" must be collected. RCW
 8 § 29A.56.180(2). Signatures in support of recalling a county officer must be collected and filed
 9 within one hundred eighty days after the issuance of a ballot synopsis by the superior court.
 10 RCW § 29A.56.150. If the superior court decision is appealed, the period for collecting and
 11 filing "signatures begins on the day following the issuance of the decision by the supreme court."
 12 *Id.* The county auditor then determines if the petition bears the required number of signatures and
 13 verifies the signatures. RCW § 29A.56.210. If enough signatures are properly gathered, the
 14 county auditor certifies the petition as sufficient and fixes a "date for the special election to
 15 determine whether or not the officer charged shall be recalled and discharged from office." *Id.*
 16 If the recall is successful and the office is vacated, the county board of commissioners appoints a
 17 successor. RCW § 36.16.110.

18 RDW had to collect 65,495 valid signatures. Dkt. 75-1, at 14. RDW collected 84,602
 19 signatures. *Id.* The Pierce County Auditor's Office invalidated 20,215 signatures, leaving a total
 20 of 64,387 valid signatures. *Id.* The recall petition failed. After late August 2011, once the recall
 21 effort failed, Ms. Farris closed down the Recall Dale Washam campaign website that had been
 22 used to organize the recall effort. Dkt. 73, at 31.

23 **D. RDW CONTACTS WITH PIERCE COUNTY COUNCILMEMBERS, ASSESSOR-
 24 TREASURER CANDIDATES, AND POTENTIAL CANDIDATES**

1 One of the issues in this Motion for Summary Judgment is whether Plaintiffs had
 2 sufficient contacts and communications with members of the local political community to create
 3 the appearance of or actual corruption during the recall effort. Plaintiffs had contacts with
 4 several individuals, which will be outlined below.

5 **1. Pierce County Councilmember Tim Farrell**

6 Before August of 2011, RDW, through Ms. Farris, had four contacts with Tim Farrell.
 7 Dkt. 75, at 21. Ms. Farris exchanged a message with Mr. Farrell on Facebook, met him at a
 8 legislative district meeting, met him at a parade, and had a telephone conversation with him. *Id.*
 9 Ms. Farris states that she asked Mr. Farrell a question on Facebook about the process for
 10 replacing the Assessor-Treasurer if Mr. Washam were recalled. *Id.* at 22. Mr. Farrell responded
 11 and explained the process. *Id.* At the time of the Facebook communication, Ms. Farris had
 12 heard rumors that Mr. Farrell was a candidate for the Assessor-Treasurer position in 2012. *Id.* at
 13 24. Ms. Farris learned that Mr. Farrell was actually a candidate for the position when she
 14 attended the legislative district meeting, sometime after the Facebook contact. *Id.* at 24. After
 15 the legislative district meeting, Ms. Farris and Mr. Farrell communicated during a parade
 16 regarding a copy of the Facebook post, which surfaced in this litigation. Dkt. 74, at 12. RDW
 17 never asked Mr. Farrell to contribute to RDW and Mr. Farrell never contributed to RDW. Dkt.
 18 75, at 25.

19 **2. Pierce County Councilmember Dick Muri**

20 Before the recall effort ended in August of 2011, Ms. Farris had five contacts with Mr.
 21 Muri, including one e-mail, three telephone conversations, and one interaction at the RDW
 22 closing event. Dkts. 74, at 6-9; 75, at 34; 75-1, at 1-2. First, Mr. Muri e-mailed Ms. Farris and
 23 asked her to contact him. Dkt. 75, at 34. Ms. Farris then called Mr. Muri and they spoke about
 24

1 Ms. Farris's background and motivation for initiating the recall petition. *Id.* In the second
 2 telephone conversation, Mr. Muri asked Ms. Farris what her plans were for deploying volunteers
 3 to collect signatures for the recall petition and gave advice about collecting signatures. Dkt. 75-
 4 1, at 1. During the third telephone conversation, Mr. Muri offered to collect signatures. *Id.* at 2.
 5 In their final contact, Mr. Muri attended RDW's closing party. *Id.* Ms. Farris states that at no
 6 time did she and Mr. Muri discuss possible replacement candidates that the Council would
 7 appoint in the event of a successful recall. Dkt. 74, at 8.

8 **3. Candidate Corrigan Gommenginger**

9 Mr. Gommenginger contacted Ms. Farris through the RDW website, volunteering to help
 10 with the campaign finance reporting requirements. Dkt. 74, at 23. After Ms. Farris did not hear
 11 from him regarding his request to volunteer, Ms. Farris contacted him. Dkt. 75-1, at 3. Mr.
 12 Gommenginger told Ms. Farris that he could not volunteer after all because he was thinking of
 13 running for the Assessor-Treasurer position in 2012. *Id.* On May 15, 2012, Mr. Gommenginger
 14 posted on his website (voteforcorrigan.com) that he was dropping out of the race and that he was
 15 endorsing candidate Billie O'Brien. *Id.* at 17.

16 **4. Candidate Billie O'Brien**

17 Ms. Farris had five contacts with Ms. O'Brien, an employee of the Assessor-Treasurer's
 18 Office, which included telephone conversations, text messages, one meeting at a public auction,
 19 and one meeting after the recall campaign failed. Dkts. 74, at 14; 75, at 26. Ms. Farris stated
 20 that Ms. O'Brien never expressed to Ms. Farris an interest in running for the Assessor-Treasurer
 21 position. Dkt. 74, at 23. Ms. O'Brien eventually filed her candidacy in June of 2012. *Id.* at 25.
 22 Ms. Farris and Ms. O'Brien first contacted each other on the telephone, during which Ms.
 23 O'Brien provided background information to Ms. Farris about the function of the Assessor-
 24

1 Treasurer's Office. Dkt. 75, at 26. In November of 2010, Ms. Farris attended an Assessor-
 2 Treasurer's property auction where she interacted with Ms. O'Brien in a group setting with other
 3 employees of the Assessor-Treasurer's Office and talked about Dale Washam's absence at the
 4 auction. Dkts. 75, at 25-27; 74, at 24-25. Ms. Farris also texted Ms. O'Brien and other
 5 employees to update them on the results of RDW's litigation in superior court. Dkts. 75, at 26;
 6 74, at 25. RDW never asked for nor did Ms. O'Brien give any contributions to RDW. Dkt. 75,
 7 at 28. Finally, Ms. Farris and Ms. O'Brien met after the recall petition failed and discussed why
 8 Ms. O'Brien was running for Assessor-Treasurer. *Id.*

9 **5. Candidate Mike Lonergan**

10 Ms. Farris had two contacts with Mr. Lonergan, one during the recall campaign and one
 11 after the campaign. Dkt. 74, at 26-27. First, in the spring of 2011, Ms. Farris acted as a call-in
 12 guest on Mr. Lonergan's radio talk show, during which Ms. Farris talked for two or three
 13 minutes about the recall. *Id.* at 26. Later, in June of 2012, Ms. Farris and Mr. Lonergan met for
 14 coffee. *Id.* at 27. Ms. Farris stated that, during this meeting, she believed that Mr. Lonergan
 15 wanted her to endorse him, which she did not. *Id.* During the recall campaign, no one indicated
 16 to Ms. Farris that Mr. Lonergan was considering running for the Assessor-Treasurer position. *Id.*

17 **6. Candidate Spiro Manthou**

18 Ms. Farris and Mr. Manthou had one contact. In June of 2012, they met, and Mr.
 19 Manthou asked for Ms. Farris's endorsement. Dkt. 74, at 28. She did not give him an
 20 endorsement. *Id.* Ms. Farris had no contact with Mr. Manthou during the recall campaign and
 21 no one indicated to her that Mr. Manthou was considering running for the Assessor-Treasurer
 22 position. *Id.*

23 **7. Candidate Dale Washam**

1 Ms. Farris and Mr. Washam never made contact with each other, except during the two
 2 recall petition sufficiency hearings in superior court. Dkt. 74, at 29. During the recall campaign,
 3 Ms. Farris did not know that he was running for re-election. *Id.*

4 **8. Contacts with Assessor-Treasurer Office Employees and the Office's Union**

5 During the recall campaign, RDW and Ms. Farris had several communications with
 6 Assessor-Treasurer Office employees (Dkt. 74, at 13-14) and Teamsters Local 117, the union
 7 representing the Office's employees (Dkt. 75-2, at 10-25). The Office's employees provided Ms.
 8 Farris with background information about the Office. Dkt. 74, at 13-14. Also, Ms. Farris
 9 produced a strategic program for the Teamsters to identify, train, and mentor Teamster 117
 10 candidates to run for local political office in the future. Dkt. 75-2, at 21-25.

11 **PROCEDURAL HISTORY**

12 **A. MOTION FOR PRELIMINARY INJUNCTION**

13 On June 21, 2011, Plaintiffs filed a Motion for Preliminary Injunction, arguing that
 14 enforcement of RCW § 42.17.640(3) (now 42.17A.405(3)) violates Plaintiffs' free speech
 15 protections under the First Amendment of the United States Constitution by limiting the amount
 16 of contribution that a person may donate to a recall committee. Dkt. 13. On July 15, 2011, this
 17 Court granted Plaintiffs' Motion. Dkt. 30. On January 19, 2012, the Ninth Circuit Court of
 18 Appeals affirmed (case no. 11-35620). Dkt. 48. The appeals court reasoned that Plaintiffs
 19 would likely succeed on the merits and would suffer irreparable harm by engaging in protected
 20 political speech because Defendants had not shown any evidence of the appearance of or actual
 21 corruption between RDW and any candidates, potential candidates, or councilmembers. Dkt. 48.

22 **B. MOTION FOR SUMMARY JUDGMENT**

1 On August 28, 2012, Plaintiffs filed this Motion for Summary Judgment. Dkt. 61.

2 Plaintiffs argue that RCW §§ 42.17A.405(3) and 42.17A.420(1) are unconstitutional facially and
 3 as applied to Plaintiffs because (1) the structure of Washington's recall process prohibits recall
 4 committees from coordinating their campaigns with replacement candidates, which negates the
 5 appearance of quid pro quo corruption; (2) a disproportionate influence from recall committees is
 6 not a sufficient justification for enforcing contribution limits on recall campaigns; and (3) lack of
 7 voter access to contributor information is not a sufficient justification for enforcing contribution
 8 limits on recall campaigns. Dkt. 61.

9 In response, Defendants first argue that Plaintiffs request to enjoin enforcement of RCW
 10 §§ 42.17A.405(3) and 42.17A.420(1) is moot because (1) there is no live controversy, given that
 11 the recall campaign has ended; (2) RCW § 42.17A.420(1) never applied to Plaintiffs, given that
 12 the campaign ended prior to the date when RCW § 42.17A.420(1) would have taken effect; and
 13 (3) RCW § 42.17A.420(1) has already been declared unconstitutional. Dkt. 70, at 9-12.

14 Alternatively, Defendants argue that the provisions at issue are facially constitutional because
 15 Plaintiffs cannot show that the provisions are substantially overbroad by infringing on protected
 16 speech because the government has a legitimate interest in deterring the appearance of
 17 corruption. *Id.* at 13-15. Last, Defendants argue that the provisions are constitutional as applied
 18 to Plaintiffs because there are issues of material fact regarding an appearance of corruption
 19 between RDW, Ms. Farris, existing and subsequent candidates, candidate committee staff, and to
 20 and from the Council that would appoint a successor in the event of a successful recall. *Id.* at 17.

21 In reply, Plaintiffs argue that the case is not moot because it is capable of repetition and
 22 would evade review if not reviewed by this Court. Dkt. 76, at 5-6. Second, Plaintiffs argue that
 23 RCW § 42.17A.405(3) is unconstitutional on its face and as applied to Plaintiffs because (1) there
 24 is no actual or appearance of corruption, given that no evidence exists showing RDW contributed

1 to or coordinated with candidates; and (2) the provision is overbroad by prohibiting a substantial
 2 amount of protected speech. *Id.* at 6-12.

3 In their Surreply, Defendants request that the Court strike several declarations filed in
 4 support of Plaintiffs' Reply: the declarations of (1) Robin Farris (Dkt. 77); (2) Jeanette Peterson
 5 (Dkt. 78); (3) Jeffrey P. Helsdon (Dkt. 79); (4) Thomas Oldfield (Dkt. 80); and (5) Tracey Apata
 6 (Dkt. 81). Dkt. 83. Defendants also request that the Court strike those portions of Plaintiffs'
 7 Reply that rely on these declarations. *Id.* Defendants argue that the declarations (1) are not
 8 properly sworn; (2) are not attested to being made from personal knowledge; and (3) assert new
 9 issues based on previously undisclosed facts. *Id.*

10 **SUMMARY JUDGMENT STANDARD**

11 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
 12 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
 13 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is
 14 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
 15 showing on an essential element of a claim in the case on which the nonmoving party has the
 16 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
 17 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
 18 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
 19 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some
 20 metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a
 21 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
 22 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*

1 *Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
 2 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The court
 4 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
 5 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
 6 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
 7 of the nonmoving party only when the facts specifically attested by that party contradict facts
 8 specifically attested by the moving party. The nonmoving party may not merely state that it will
 9 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
 10 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
 11 Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not
 12 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

13 DISCUSSION

14 **A. Motion to Strike**

15 Defendants argue that the declarations supporting Plaintiffs’ Reply (1) are not properly
 16 sworn; (2) are not attested to being made from personal knowledge; and (3) assert new issues
 17 based on previously undisclosed facts. Dkt. 83.

18 “It is well established that new arguments and evidence presented for the first time in
 19 Reply are waived.” *Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash.
 20 2006). Here, Plaintiffs presented the new issue of standing that was not contained in their
 21 original Motion. Nor were the facts regarding Plaintiffs’ current recall efforts disclosed in the
 22 filings with Plaintiffs’ original Motion. For these reasons, the Court should grant Defendants’
 23 Motion to Strike the declarations of (1) Robin Farris (Dkt. 77); (2) Jeanette Peterson (Dkt. 78);
 24

1 (3) Jeffrey P. Helsdon (Dkt. 79); (4) Thomas Oldfield (Dkt. 80); (5) Tracey Apata (Dkt. 81); and
 2 those portions of Plaintiffs' Reply that rely on these declarations.

3 **B. Standing**

4 Defendants argue that RCW § 42.17A.405(3) is moot because RDW has ceased
 5 operations. Defendants also argue that RCW § 42.17A.420(1) is moot because RDW efforts
 6 failed and never reached the general election ballot, and because the court in *Family PAC v.*
 7 *McKenna*, 685 F.3d 800 (9th Cir. 2012) already ruled that RCW § 41.17A.420(1) is
 8 unconstitutional.

9 Plaintiffs argue that RCW § 42.17A.405(3) is not moot because Plaintiffs' actions are
 10 capable of repetition and would evade review if not reviewed by this Court. Plaintiffs do not
 11 argue against the mootness of the challenge to RCW § 42.17A.420(1).

12 “A plaintiff must allege personal injury fairly traceable to the defendant's allegedly
 13 unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S.
 14 737, 751 (1984). To determine if a case is moot, a court must decide if it can give any effective
 15 relief in the event that it decides the matter on the merits; if a court can grant such relief, the
 16 matter is not moot. *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th
 17 Cir. 2011). “The exception applies where (1) the challenged action is in its duration too short to
 18 be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the
 19 same complaining party will be subject to the same action again.” *Id.* (citation omitted)

20 1. RCW § 42.17A.420(1): \$5,000 Limit

21 The Ninth Circuit in *Family PAC v. McKenna*, 685 F.3d 800 (9th Cir. 2012) ruled that
 22 RCW § 42.17A.420(1) is unconstitutional. It is unnecessary for this Court to review the
 23 constitutionality of RCW § 42.17A.420(1). The Plaintiffs' challenge to RCW § 42.17A.420(1) is
 24

1 moot and, therefore, they do not have standing. To the extent Plaintiffs' Motion is based on a
2 challenge of RCW § 42.17A.420(1), it should be denied.

3 2. RCW § 42.17A.405(3): \$900 Limit

4 On appeal from this Court's preliminary injunction, the Ninth Circuit held that the
5 exception to the mootness doctrine applied in this case because “[t]he parties could not
6 practically obtain appellate review of the district court order within this time. Furthermore, if the
7 plaintiffs attempt another recall, they will be subject to the same \$800 contribution limit.” *Farris*
8 *v. Seabrook*, 677 F.3d 858, 863-64 (9th Cir. 2012) (citation omitted). Nothing has changed this
9 rationale for applying the exception to the mootness doctrine in this case. This Court should find
10 that Plaintiffs' challenge to RCW § 42.17A.405(3) is not moot and, therefore, they have
11 standing.

12 **C. Constitutionality of RCW § 42.17A.405(3): \$900 Limit**

13 1. As-Applied Challenge

14 Defendants contend that Plaintiffs have had sufficient contact and communication
15 with candidates, potential candidates, councilmembers, union representatives, and
16 employees of the Assessor-Treasurer's Office to create the appearance of corruption.
17 Plaintiffs argue that these contacts are insufficient to create the appearance of corruption
18 because RDW did not coordinate expenditures during any of these contacts and
19 communications.

20 On appeal from this Court's preliminary injunction, the Ninth Circuit outlined the
21 law governing First Amendment challenges to contribution limits for recall committees.
22 “Under the First Amendment, contribution limitations are permissible as long as the
23 Government demonstrates that the limits are closely drawn to match a sufficiently

1 important interest. . . . [S]tates have an important governmental interest in preventing the
 2 actuality or appearance of quid pro quo corruption. . . . This anticorruption interest
 3 justifies limits on contributions to political committees operated by candidates
 4 themselves. . . . It also justifies limits on contributions to committees that, although
 5 formally separate from the candidate, are sufficiently close to the candidate to present a
 6 risk of actual or apparent corruption.” *Farris*, 677 F.3d at 865 (internal citations omitted).

7 The *Farris* Court continued

8 On the other hand, both this court and the Supreme Court have rejected
 9 contribution limits as applied to committees having only a tenuous connection to
 10 political candidates. In *Citizens United*, the Court held that a federal law
 11 restricting corporate and union spending on electioneering communications that
 12 support or oppose a political candidate could not be sustained by the
 13 anticorruption interest. The Court reasoned that the absence of prearrangement
 14 and coordination of an expenditure with the candidate or his agent not only
 15 undermines the value of the expenditure to the candidate, but also alleviates the
 16 danger that expenditures will be given as a *quid pro quo* for improper
 17 commitments from the candidate.

18 Similarly, in *Long Beach*, we invalidated contribution limits as applied to
 19 political action committees making independent expenditures to support or
 20 oppose candidates for office. We explained that:

21 the strength of the state's interest in preventing corruption is highly
 22 correlated to the nature of the contribution's recipient. Thus, the
 23 state's interest in the prevention of corruption—and, therefore, its
 24 power to impose contribution limits—is strongest when the state
 25 limits contributions made directly to political candidates. . . . As
 26 one moves away from the case in which a donor gives money
 27 directly to a candidate, however, the state's interest in preventing
 28 corruption necessarily decreases.

29 We observed that the Supreme Court has upheld limitations on contributions to
 30 entities whose relationships with candidates are sufficiently close to justify
 31 concerns about corruption or the appearance thereof. Because the political action
 32 committees made independent expenditures and were several significant steps
 33 removed from the case in which a donor gives money directly to a candidate, we
 34 held that the state's anticorruption interest was insufficient to uphold the
 35 contribution limits.

36 Like independent expenditure committees, recall committees in
 37 Washington have at most a tenuous relationship with candidates. The contribution
 38 limit here is thus materially indistinguishable from the limit we invalidated in
 39 *Long Beach*. Under Washington's recall system, political committees seeking to

1 recall officials do not coordinate their spending with candidates for office. In the
 2 event a recall is successful, the successor to office is appointed by a governmental
 3 entity designated by state law—in this case, the Pierce County Council. *See*
 4 Wash. Rev. Code § 36.16.110; Pierce County, Wash., Charter art. 4, § 4.70. Thus,
 5 as Washington law is structured, expenditures by recall committees are similar to
 6 independent expenditures. Given that recall committees do not coordinate or
 7 prearrange their independent expenditures with candidates, and they do not take
 8 direction from candidates on how their dollars will be spent, they do not have the
 9 sort of close relationship with candidates that supports a threat of actual or
 10 apparent corruption.

11 *Farris*, 677 F.3d at 866-67 (internal citations and quotations omitted).

12 The Ninth Circuit, however, left open the possibility that “the outcome might be different
 13 if there were evidence that contributions were being made with a ‘wink and a nod’ from Council
 14 members indicating that a particular candidate would be appointed.” *Farris*, 677 F.3d at 867 n.8.
 15 Therefore, although Washington law is structured to prevent recall committees from coordinating
 16 expenditures with candidates, the Ninth Circuit recognized that the possibility of coordination
 17 does exist. That possibility is at issue in the Motion for Summary Judgment before this Court.

18 Here, there is no evidence in the record that that contributions were made with ‘a wink
 19 and a nod’ from Councilmembers about who the Council would appoint in the event of a
 20 successful recall. RDW’s communication with Councilmember Farrell only involved relaying
 21 information about the recall process via Facebook. RDW’s communication with Councilmember
 22 Muri only involved explaining Ms. Farris’s motivation for starting the recall, and relaying
 23 information and advice about plans to collect signatures for the recall effort.

24 There is no evidence that Plaintiffs coordinated expenditures with candidates or potential
 25 candidates. RDW’s communication with Candidate Gommenginger only involved a withdrawn
 26 request to volunteer for RDW. RDW’s communication with Candidate O’Brien only involved
 27 providing information on how the Assessor-Treasurer’s Office functioned, questioning why Dale
 28 Washam was not present at a property auction, updating Candidate O’Brien and other Assessor-

1 Treasurer employees about RDW's litigation in superior court, and, after RDW ceased
 2 operations, why Candidate O'Brien was running for office. Further, RDW's communications
 3 with Candidate Lonergan only involved Ms. Farris informing Mr. Lonergan's radio show
 4 listeners about RDW's recall efforts, and, after RDW ceased operations, Ms. Farris's denied
 5 endorsement of Mr. Lonergan. Also, RDW's communication with Candidate Manthou, after
 6 RDW ceased operations, only involved Ms. Farris's denied endorsement of Mr. Manthou.

7 Finally, there is no evidence of coordination between Plaintiffs and employees of the
 8 Assessor-Treasurer's Office or union representatives in regards to contributions, expenditures, or
 9 election of a new Assessor-Treasurer.

10 In sum, the only evidence presented regarding RDW communications concerns
 11 exchanges of information about the recall process, the progress of RDW's recall efforts, denial of
 12 requests for endorsements after RDW ceased operations, and innocuous exchanges between local
 13 political professionals. There is no evidence of coordination of expenditures or 'a wink and a
 14 nod' to justify the State's anti-corruption interest. The Government has presented no evidence
 15 demonstrating an issue of material fact regarding the appearance of or actual corruption.

16 For these reasons, the Court should grant summary judgment for Plaintiffs and hold RCW
 17 § 42.17A.405(3) unconstitutional as applied to Plaintiffs.

18 2. Facial Challenge

19 Because this Court should provide Plaintiffs' requested relief and hold that RCW §
 20 42.17A.405(3) is unconstitutional as applied to Plaintiffs, the Court need not address whether
 21 RCW § 42.17A.405(3) is unconstitutional on its face.

22
 23
 24

1 Accordingly, it is hereby **ORDERED** that Plaintiffs' Motion for Summary
2 Judgment (Dkt. 61) is **GRANTED**. Defendants are permanently enjoined from enforcing
3 RCW § 42.17A.405(3) against Plaintiffs in this case only.

4 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
5 to any party appearing pro se at said party's last known address.

6 Dated this 6th day of November, 2012.

Robert G. Bryan

ROBERT J. BRYAN
United States District Judge